

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|--|---|--------------------|
| DANIEL HAMRICK |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 183,004 |
| ARABIAN HORSE EXPRESS |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| FARMERS ALLIANCE MUTUAL INSURANCE CO. |) | |
| Insurance Carrier |) | |

ORDER

The claimant appealed the Order dated February 18, 1998, entered by Administrative Law Judge Jon L. Frobish denying the application for payment of benefits and request for penalties.

APPEARANCES

Gregory G. Lower of Wichita, Kansas, appeared for the claimant. M. Doug Bell of Coffeyville, Kansas, appeared for the respondent and its insurance company.

RECORD

The record consists of the administrative file assembled in this proceeding. Although a hearing was scheduled for February 11, 1998, the parties did not conduct a hearing on that date and, instead, submitted their arguments to the Administrative Law Judge by letter.

ISSUES

While a workers compensation proceeding is pending before the Court of Appeals, a worker is entitled to receive the weekly disability compensation that the Appeals Board awarded as it accrues, plus the disability compensation that accrued during the ten-week period before the Appeals Board's decision. In this post-award application for benefits and penalties, the Administrative Law Judge determined that the only benefits that remain

unpaid on the Appeals Board's award were those that were not required to be paid until the Court of Appeals renders its decision. The claimant appealed that finding and now requests Appeals Board review.

The only issues before the Appeals Board on this appeal are (1) whether claimant is entitled additional weekly benefits while his appeal is pending before the Court of Appeals and, (2) if so, is he entitled to an order for penalties for nonpayment of benefits.

FINDINGS OF FACT

After reviewing the record, the Appeals Board finds as follows:

(1) This claim for an October 13, 1990, myocardial infarction was originally decided by Administrative Law Judge Shannon S. Krysl in an Award dated August 28, 1995. In that Award, the Judge found claimant had a 62 percent permanent partial general disability and was entitled to \$262.32 per week in permanent partial general disability benefits for a total award of \$100,000. As of August 26, 1995, the Judge found 254 weeks of the award had accrued for a total of \$66,629.28.

(2) The respondent and its insurance carrier appealed the Award to the Appeals Board, which heard oral argument on January 25, 1996. By Order dated February 7, 1997, the Appeals Board rendered its decision which increased claimant's permanent partial general disability to 74 percent. Although the total award remained at \$100,000, the Appeals Board's decision increased the weekly permanent partial general disability payment to \$278. The Appeals Board determined that as of January 15, 1997, 326.57 weeks of permanent partial general disability benefits had accrued at \$278 per week for a total of \$90,786.46 and that 33.14 weeks of permanent partial general disability benefits would accrue after that date. The total number of weeks awarded equaled less than 415 because \$100,000, which is the statutory maximum award for this date of accident, is reached at approximately 359.71 weeks when paid at \$278 per week.

(3) The respondent and its insurance carrier appealed the Appeals Board's decision to the Court of Appeals where it is currently pending.

(4) By certified letter dated November 3, 1997, the claimant wrote the insurance carrier and its attorney to demand payment of benefits. Having not received payment, claimant scheduled a hearing for February 11, 1998, for the Administrative Law Judge to determine the questions of penalties and whether claimant was entitled to receive weekly disability compensation benefits during the pendency of the appeal. Rather than having an evidentiary hearing, the parties submitted their arguments to the Administrative Law Judge by letter.

(5) After considering the parties' arguments, by Order dated February 18, 1998, Administrative Law Judge Jon L. Frobish denied claimant's request for payment of benefits

and penalties. The claimant then appealed the February 18, 1998 Order and initiated this review.

(6) In their February 12, 1998 letter to the Administrative Law Judge, the respondent and its insurance carrier represent that they began paying claimant \$262.32 per week in permanent partial disability benefits commencing 30 days after oral argument to the Appeals Board, as required by statute.

(7) The respondent and its insurance carrier also represent in their letter that they increased the weekly disability payment to claimant to \$278 per week after the Appeals Board rendered its decision. They also paid claimant the difference between \$262.32 and \$278 for the ten-week period immediately before the Appeals Board's decision. Therefore, from the date of the Appeals Board's decision on February 7, 1997, and for the ten-week period before that date, the respondent and its insurance carrier represented it has paid claimant \$278 per week as required by statute.

(8) When the Appeals Board rendered its decision, claimant was entitled to 33.14 weeks of future permanent partial general disability benefits. When that period expired, the respondent and its insurance carrier discontinued their weekly payments. They contend that the only disability benefits that have not been paid are those that accrued before the 31st day following oral argument to the Appeals Board and before the ten-week period immediately preceding the Appeals Board's decision and, thus, are not required to be paid until the Court of Appeals renders its decision.

(9) Claimant argues the respondent and its insurance carrier should continue to pay benefits on a weekly basis as they could recover any overpayment from the Workers Compensation Fund in the event they prevail before the Court of Appeals. Claimant contends the Legislature intended workers to receive weekly benefits during the pendency of an appeal in all events and regardless of whether all of the benefits awarded have accrued. In his letter to the Administrative Law Judge dated February 17, 1998, claimant does not contest the statements from the respondent and its insurance carrier that they have paid the amounts represented.

CONCLUSIONS OF LAW

The Order denying claimant's request for benefits and penalties should be affirmed.

(1) When awards are appealed from the administrative law judge to the Appeals Board, the Board has 30 days from the date the parties presented their arguments to the Board to issue its decision. If the Appeals Board fails to render a timely decision, the employer must begin paying the weekly disability compensation benefits that the administrative law judge awarded that accrue commencing the 31st day following argument. But, while the case remains pending before the Appeals Board, the employer is not required to pay any

of the disability compensation that accrued before that 31st day. K.S.A. 1997 Supp. 44-551(b) provides in pertinent part as follows:

(2)(A) . . . The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

(B) If an order on review is not issued by the board within the applicable time period prescribed by subsection (b)(1), medical compensation and any disability compensation as provided in the award of the administrative law judge shall be paid commencing with the first day after such time period and shall continue to be paid until the order of the board is issued, **except that no payments shall be made under this provision for any period before the first day after such time period.** Nothing in this section shall be construed to limit or restrict any other remedies available to any party to a claim under any other statute. [Emphasis added.]

(2) If the Appeals Board's decision is then appealed to the Court of Appeals, the employer must begin paying the weekly disability compensation that accrues from the effective date of the Appeals Board's decision, plus the weekly benefits that accrue during the ten-week period immediately before the Board's decision. K.S.A. 1997 Supp. 44-556(b) provides:

Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

(3) K.S.A. 44-556 was amended in 1993. Before that amendment, the statute read in pertinent part, "[i]f review of the decision of the district court is sought . . ., the compensation payable under the decision of the district court shall not be stayed pending such review." The Appeals Board, however, has previously determined that the change was procedural and, therefore, the 1993 amendment applies retroactively. Britt v. Theratronics International, Ltd., Docket No. 184,811 (August 1997); and Byers v. Morton Buildings, Inc., Docket No. 173,408 (May 1998).

(4) The only disability compensation that is left to be paid to claimant under the award represents weeks of permanent partial general disability benefits that accrued either before the Administrative Law Judge's decision or the Appeals Board's decision and that, by reason of the above-quoted statutes, are not required to be paid until the Court of Appeals renders its decision. Before the Legislature amended the law in 1993, such past due benefits were required to be paid. Now, however, they are not. Unfortunately, that change has the potential to cause hardship to injured workers who have difficulty returning to work or recovering from the financial setback sustained due to their work-related injury.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order dated February 18, 1998, entered by Administrative Law Judge Jon L. Frobish should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gregory G. Lower, Wichita, KS
M. Doug Bell, Coffeyville, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director